Nos. 78-606 and 78-607

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL., *Respondents.*

GENERAL TELEPHONE COMPANY OF CALIFORNIA,
Petitioner,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL., *Respondents.*

On Petitions for Writs of Certiorari to the Supreme Court of the State of California

---

PETITIONERS' REPLY BRIEF IN SUPPORT OF CERTIORARI

ROBERT V. R. DALENBERG
MARGARET DEB. BROWN
140 New Montgomery St.
San Francisco, Cal. 94105

Attorneys for Pacific Telephone and Telegraph Company

Of Counsel:

MORTIMER M. CAPLIN
1101 Seventeenth St., N.W.
Washington, D.C. 20036

FRANK ROTHMAN
GARY N. JACOBS
2049 Century Park East
Los Angeles, Cal. 90067

WILLIAM H. ALLEN
JOHN B. JONES, JR.
ROBERT M. JENKINS, III
888 Sixteenth Street, N.W.
Washington, D.C. 20006

ALBERT M. HART
100 Wilshire Boulevard
Santa Monica, Calif. 90401

Attorneys for General Telephone Company of California

Of Counsel:

GEORGE E. SHERTZER
One Stamford Forum
Stamford, Conn. 06904

HERBERT WECHSLER
435 W. 116th Street
New York, N. Y. 10027

November 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-606 and 78-607

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL., *Respondents.*

GENERAL TELEPHONE COMPANY OF CALIFORNIA,
Petitioner,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL., *Respondents.*

On Petitions for Writs of Certiorari to the Supreme Court of the State of California

---

PETITIONERS' REPLY BRIEF IN SUPPORT OF CERTIORARI

The Public Utilities Commission states in the conclusion to what is styled a brief in opposition that it agrees with petitioners and the United States that this Court should hear and decide the issue of tax eligibility

now. (PUC Br. in Opp. 14-15.) We assume that this is the true position of the Commission and that the title of its document is a mere bow to convention. However, there are comments in the body of the brief more consonant with the title than the conclusion that call for brief response.

First, we note some things not said in the Commission's brief. Significantly, the Commission does not try to pretend that the issue of eligibility for the tax benefits is not presented. (PUC Br. in Opp. 4.) The Commission does not follow the other respondents into their particular never-never land, where vindictiveness replaces rationality as the theme of utility regulation and an agency may act to pass through to ratepayers tax benefits that, once the agency so acts, no longer exist. (Cities Br. in Opp. 11-13; TURN Br. in Opp. 21-23.) Nor does the Commission urge, as do its would-be seconds, the mistaken proposition that the California Supreme Court affirmed some decision other than the one the Commission rendered. (Cities Br. in Opp. 11-13; TURN Br. in Opp. 21-24.) The Commission did not make, and the California Supreme Court did not pass upon, a decision that the rates prescribed for Pacific and General were just and reasonable even if eligibility for the tax benefits were lost and tax expenses were consequently higher and net revenues correspondingly lower than was assumed in the Commission's rate calculations.

The Commission likewise does not join in the transparently erroneous suggestion that, if this Court were to review a state decision expressly predicated on a particular interpretation of federal law, which immediately reduces the rates that certain utilities can charge and ultimately affects their tax liability, it would be

rendering an advisory opinion on the meaning of that law. (Cities Br. in Opp. 11-21; TURN Br. in Opp. 27-31.)

What the Commission does say in questioning aspects of the two petitions for certiorari is either as mistaken as the arguments of its fellow respondents or trivial or both.

Both trivial and mistaken is the discussion, extending over more than a page, of the specificity with which General and Pacific stated how they raised in the California Supreme Court the federal questions presented here. (PUC Br. in Opp. 4-6.) These questions were substantially the whole subject of the petitions for review below. The descriptions in the petitions for certiorari are full, fair and adequate. To allay any conceivable doubt, 10 copies of each of the petitions for review below are being lodged with the Clerk.

The Commission is plainly mistaken in the further suggestion that General and Pacific differ in their view of the question of statutory construction or that the statement of the question by one or the other, here or below, is somehow incomplete. (*Id.* at 6-7.) There can be no controversy over what the Supremacy Clause says and means. It says that the Constitution and laws of the United States made in pursuance of it "shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." It means that whenever state authorities profess to apply federal law, and their interpretation of it is questioned, the issue arises under the Supremacy Clause.[1] The constitutional obli-

[1] Contrary to the Commission's suggestion, Pacific raised the issue of federal supremacy in its petition for writ of review to the California Supreme Court (pp. 62-63; *see also* pp. 32, 34) as well as in its reply brief in that court (pp. 23-24).

gation of the state judges and other authorities is to apply the law Congress has written, as this Court ultimately construes it, and not some other law of their own devising that departs from the Congressional mandate. There is no requirement of a talismanic invocation of the Supremacy Clause when it thus necessarily underlies any claim that a state has misread federal law.[2]

The Commission is also mistaken in its assertion that the question it has decided has no ramifications beyond the rates of the two California telephone companies. (*Id.* at 9-10.) Its own undertaking to apply precisely the same ratemaking methods challenged in those cases to another utility, *see Sierra Pacific Power Co.*, 23 P.U.R.4th 485, 489 (Cal. P.U.C. 1978), belies its assertion. The Commission furthermore has no power to control the use by commissions in other states of its regulatory methods as a model, regardless how peculiar to the situation of General and Pacific it may view its own action. The concern of the utilities that have asked leave to present their views as amici curiae in support of the petitions is obviously well founded. The Treasury shares that concern, as evidenced by the memorandum of the United States.

That memorandum suffices, we believe, to dispel the impression that the Commission tries to create of uncertainty within the federal government. (*Id.* at 12-14.) It is clear that the Secretary of the Treasury and his delegate the Commissioner of Internal Revenue are convinced that the Commission misread the tax statutes. It is clear also that, if nothing further happens, the federal tax collection agents under the direction of the Secretary and the Commissioner will move to assess what will probably be upwards of $2 billion of tax deficiencies against the two petitioners.

[2] *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 143 (1864); *see also New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928); *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 254 (1957).

So far as the Commission's arguments on the merits are concerned (*id.* at 8-9, 10-12), those can be dealt with when the cases are heard on their merits. What is significant at this stage is that the affected utilities, the agency whose order is in issue and the United States are at one on the desirability of immediate review by this Court.

Respectfully submitted,

ROBERT V. R. DALENBERG
MARGARET DEB. BROWN
140 New Montgomery St.
San Francisco, Cal. 94105

Attorneys for Pacific Telephone and Telegraph Company

Of Counsel:

MORTIMER M. CAPLIN
1101 Seventeenth St., N.W.
Washington, D.C. 20036

FRANK ROTHMAN
GARY N. JACOBS
2049 Century Park East
Los Angeles, Cal. 90067

WILLIAM H. ALLEN
JOHN B. JONES, JR.
ROBERT M. JENKINS, III
888 Sixteenth Street, N.W.
Washington, D.C. 20006

ALBERT M. HART
100 Wilshire Boulevard
Santa Monica, Calif. 90401

Attorneys for General Telephone Company of California

Of Counsel:

GEORGE E. SHERTZER
One Stamford Forum
Stamford, Conn. 06904

HERBERT WECHSLER
435 W. 116th Street
New York, N. Y. 10027

November 1978